No. 80-1127

In the Supreme Court of the United States

OCTOBER TERM, 1980

C-F AIR FREIGHT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(1) of the National Labor Relations Act, by threatening to close its facility if its employees engaged in union activity, and Section 8(a)(3) and (1) of the Act, by closing the facility and subcontracting the work formerly performed there to prevent the unionization of its employees.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 5

Conclusion 7

TABLE OF AUTHORITIES

Cases:

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 ..... 4, 5

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 6

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 1

Section 8(a)(3), 29 U.S.C. 158(a)(3) 1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The decision and order of the National Labor Relations Board (A. 1-29)[1] is reported at 247 N.L.R.B. No. 60.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1980, and a petition for rehearing was denied on October 7, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on January 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 7a-8a).

STATEMENT

1. The Board found that petitioner, an air freight forwarder, violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily closing its John F. Kennedy Airport (JFK) terminal and subcontracting the clerical work formerly performed at that location, and by failing to reinstate four clerical strikers after they had made unconditional offers to return to work following a strike (A. 18). The Board further found that petitioner violated Section 8(a)(1) of the Act by threatening employees with the closure of the terminal if they chose union representation (A. 12), and by promising

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[1]The petitioner has filed with this Court the original record submitted to the court of appeals. "A." references are to the pages of the printed court of appeals appendix, which contains the Board's decision and order and designated portions of the original transcript and exhibits presented at the unfair labor practice hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "S.A." references are to the Supplemental Appendix contained in the Board's reply brief in the court of appeals.

employees increased benefits to dissuade them from supporting a union (A. 13). The Board ordered petitioner, among other things, to offer the four clerical employees reinstatement with back pay and to resume the clerical operations formerly performed at the JFK terminal at the former location or some other reasonable location within the metropolitan New York area (A. 18-29).

The JFK terminal had lost money since 1970, but had begun to reduce its losses in early 1977 (A. 3; 92, 116). In September 1976, petitioner's Eastern Area Manager, Donald G. Berger, informed JFK Terminal Manager Edward Ryby that although there were rumors that the JFK terminal might be closed because of lack of profits, as far as he was concerned "we were going to stay in New York and make a go of it" (A. 3-4; 312). Meanwhile, the Company "drew up a plan * * * to improve matters at JFK" (A. 3-5; 290, 267-268). The plan included the hiring of a new division manager, David Condon, whose mandate was to "concentrate on building up the sale[s] in New York," and a new sales manager and sales personnel (A. 4; 114-115, 313-314). In February 1977, petitioner's Board of Directors agreed to continue the JFK terminal based on the 1976 plan (A. 4-5; 388), and Berger informed Ryby that the terminal would continue to operate (A. 4; 313-314).

In early March 1977, several of the clerical employees met with Condon concerning a rumor that one of them was to be laid off (A. 5). In response to the declaration of one employee that there was no job security at the terminal and that the employees "needed a union there to be secure," Condon remarked that if the employees "brought a union into the office * * * the main offices in San Mateo wouldn't stand for it and they would close the doors" (A. 6; 141-142, 62, 151-152, 159-161).

Shortly thereafter, Condon was advised that morale was low at the JFK terminal and that its employees were considering

an organizational campaign (A. 6). On March 15, 1977, Condon held a meeting with the employees, at which he told them that he knew they were seeking information about unions. He assured the employees that "he was trying to make a go of it at JFK," that their jobs were safe, and that he planned to improve the terminal's financial status (A. 7; 64, 97, 119, 142-143, 156, 167, 211-212, 329). Condon then advised the employees that there "was no need for a union" and that the Company would close the terminal if a union came in (A. 7; 156, 64, 98, 119, 143, 166). Shortly thereafter, Berger advised Ryby to inform the employees "if they join a union [that he will] padlock the door" (A. 8; 66).

In early June 1977, the employees met with the president of Local 851, International Brotherhood of Teamsters, and signed authorization cards. They decided to request recognition from petitioner and to strike "to make them realize that they meant it" (A. 9; 36-37, 52-53). On June 13, the six clerical employees began their strike and picketed the JFK terminal. Petitioner refused the Union's request for recognition (A. 10) and continued to operate the JFK terminal during the picketing (A. 10; 189-190, 215).

On July 10, 1977, the clerical employees unconditionally offered to return to work, but they were not permitted to enter the terminal (A. 9). Condon later advised them that it would take "some time to reinstitute normal operations at the JFK facility" (A. 9; 353). A few days later, petitioner recalled two of the clerical employees (A. 9; 354). These employees returned to the picket line two weeks later. Petitioner did not recall any other clerical employee to work, although some of them repeatedly contacted the Company about returning. (A. 9-10.) The strike ended shortly before Labor Day. During this time, petitioner continued to work on inbound deliveries at its JFK terminal. (A. 10; 40, 184-187, 190, 335-337.) In early September, petitioner closed its JFK terminal and entered into a subcontract arrangement

with an independent trucking service to perform, at a facility located in Brooklyn, New York, the clerical functions previously performed by the non-recalled clerical employees at the JFK terminal (A. 10).

2. In finding that the closing of the terminal was discriminatorily motivated, the Administrative Law Judge, whose decision was adopted by the Board, rejected petitioner's contentions that the closing of its JFK terminal was based solely upon economic conditions and that it had decided to close the terminal in February, "before any hint of union activity among the employees" (A. 13-18). The ALJ found that the documentary evidence, as well as the assurances given to the employees in mid-March, did not support the contention that the decision to terminate was made in February (A. 15). The ALJ also relied upon petitioner's threats to close the terminal in the event that the employees chose to unionize (*ibid.*). Finally, the ALJ noted that although the JFK terminal was not profitable, the Brooklyn operation, which utilized the same number of employees and substantially the same managerial and sales force, "has not prevented [petitioner] from suffering financial loss attributable to the subcontracted work" (A. 18).

The ALJ further found that petitioner's statements to the employees about plant closure transgressed the Court's admonition in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), that predictions as to the consequences of unionization on a company must either be based on facts showing demonstrably probable consequences beyond the employer's control or convey a management decision already arrived at (A. 11). The ALJ found that petitioner had not already decided to close the terminal and that the prediction of dire consequences was not based on objective fact because petitioner's poor financial condition had nothing to do with the decision to close the terminal (A. 12).

3. The court of appeals (Pet. App. 3a) upheld the Board's decision and enforced its order, except for the finding that petitioner had unlawfully promised benefits to its employees.[2] The court found that (Pet. App. 2a-3a):

> Substantial evidence supports the finding that such a statement [concerning plant closure] was in fact made, that it was not based on any decision already taken to close the facility down, and that it reflected a retaliatory intent. It was thus not protected as a "prediction . . . carefully phrased on the basis of objective fact," *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The court also found (Pet. App. 3a) that "[s]ubstantial evidence shows that [petitioner] shut down its JFK operations and subcontracted the work for retaliatory and discriminatory purposes, in violation of §§ 8(a)(3) and (1) of the Act."

ARGUMENT

Petitioner asserts (Pet. 8-12) that certiorari should be granted here to resolve a conflict among the circuits concerning the scope of this Court's decision in *Gissel, supra*. The cases and authorities upon which petitioner attempts to rely all relate to that aspect of the *Gissel* opinion dealing with bargaining orders based on authorization cards. By contrast, there is no bargaining order here. The issue presented here is simply whether substantial evidence supports the Board's finding, upheld by the court of appeals, that petitioner's statements concerning the terminal's closure were threats of retaliation, rather than predictions based on

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[2]That aspect of the court's decision is not at issue here.

objective fact. That is a factual issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[3]

In any event, as we have shown (pages 2-4, *supra*), the Board's findings are amply supported by the record. Thus, the record shows that Condon, in early March 1977, threatened two employees with the terminal's closure if a union were brought in, and that he repeated the threat to the entire staff on March 15. Condon's threats occurred at the same time that petitioner was attempting to insure continuance of the terminal's operation and assuring the employees that their jobs were not in jeopardy.[4]

Similarly, petitioner's assertion (Pet. 15-16) that the Board and the court of appeals erred in rejecting its contention that it subcontracted the clerical work at the JFK terminal for economic reasons raises only a factual issue that does not warrant review by this Court. Moreover, as we have shown (pages 3-4, *supra*), here too the Board's findings are amply supported by the record. Thus, the record shows that petitioner planned to keep the terminal open for all of 1977, and that it attempted to do so until its employees sought to unionize. At that point, it opened a similar operation in Brooklyn, with the same sales force, but with a subcontracted clerical force, that continued to lose money.[5]

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[3]Petitioner's assertion (Pet. 16-17) that the court of appeals misapplied the *Universal Camera* standard of review amounts only to a contention that the court should have rejected the Board's evidentiary finding.

[4]Petitioner's assertion (Pet. 13) that the Board "acknowledged" that the issue was " 'not free from doubt' " is erroneous. The part of the Board's decision which petitioner quotes (A. 13) dealt with the finding of an unlawful promise of benefit, not with petitioner's threats to close the terminal.

[5]Petitioner's assertion (Pet. 15) that the decision to close was due to the continuing strike is belied by the fact that it refused to reinstate four

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the strikers when they attempted to return to work in July, two months before the strike ended (pages 3-4, *supra*), and the fact that the strike did not cause any interruption in business. The evidence of alleged union misconduct (S.A. 1-39), to which petitioner refers (Pet. 4-7, 15), occurred on one day at the beginning of the strike in mid-June, a month before the Company sent telegrams informing the clerical employees that it was attempting to resume operations, and two months before the terminal closed. There was no evidence presented at the hearing that the alleged misconduct continued after mid-June. Moreover, although the Union entered an informal settlement agreement because "the parties to this Settlement Agreement desire to settle and adjust these matters amicably and without further proceedings herein" (S.A. 34), the Company offered no evidence to show, as the Board noted (A. 20 n.12), that any of the discriminatees had engaged in specific misconduct.